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No. 144

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

IOWA-ILLINOIS GAS AND ELECTRIC COMPANY,
PETITIONER

v.

EZRA TAFT BENSON, INDIVIDUALLY AND AS SECRETARY OF AGRICULTURE, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF PETITIONER IN OPPOSITION TO MEMORANDUM FOR RESPONDENTS SUGGESTING THAT THE CASE IS MOOT

E. FONTAINE BROUN
JOHN H. PICKERING
HENRY T. RATHBUN
616 Transportation Building
Washington 6, D. C.
Attorneys for Petitioner

WILMER & BROUN
616 Transportation Building
Washington 6, D. C.
Of Counsel

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PRELIMINARY STATEMENT

This brief is submitted to demonstrate why this case is not moot and why respondents' request that it be dismissed as moot should be denied.

The case is not before this Court on the merits which indeed have not been passed upon by any court. The petition for a writ of certiorari is from a judgment of the Court of Appeals for the District of Columbia Circuit directing dismissal of the complaint for lack of standing to sue. Since respondents' suggestion of mootness is directed to the merits of the action, it must

of course be conceded, for the purposes of considering such suggestion and this opposition, that petitioner had standing to bring, and has standing to maintain, the action.

The complaint herein prayed for declaratory and injunctive relief together with "such other and further relief as to the Court may seem just and proper" (R. 2, 8, 9). Briefly the circumstances as revealed by the abbreviated record* herein are as follows:

Petitioner, an electric utility company, brought this action for declaratory, injunctive and incidental relief against a Rural Electrification Administration loan the sole purpose of which was to finance construction of a transmission line to serve the requirements of certain additional facilities of an industrial customer then receiving central station service from petitioner (R. 4-5). The loan challenged was to Central Iowa Power Cooperative (hereinafter called CIPCO), a generating and transmission cooperative, the supplier of power to Greene County Rural Electric Cooperative (hereinafter called Greene County Coop), a distribution cooperative (R. 4-5). Under the Rural Electrification Act loans are authorized only "for the furnishing of electric energy to persons in rural areas who are *not* receiving central station service."** The term "central station service" is not defined in the Act, but it is

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* Such record consists of the complaint, motion for preliminary injunction, affidavits filed in connection therewith and proceedings thereon (all of which are contained in the Joint Appendix below, nine copies of which have been furnished to this Court), and the proceedings in the Court of Appeals. The answer of respondents, filed while the case was on appeal, is not part of such record. There has been no trial or determination of the merits.

** Section 4 of the Rural Electrification Act of 1936, as amended, 7 U. S. C. § 904.

a term generally used in the electric industry to mean electricity received from a central generating station as distinguished from an individual generating unit such as a Delco plant.

The verified complaint alleges in substance as follows:

Petitioner (or its predecessor) has for years been furnishing central station service to an industrial customer, Lehigh Sewer Pipe and Tile Company (hereinafter called Lehigh Pipe) (R. 4). In 1955 that Company decided to build certain additional plant facilities on the same plot of ground on which the plant served by petitioner is located (R. 4). At the request of Greene County Coop, CIPCO included in an application to REA a loan to finance construction of a transmission line which had as its sole purpose to enable Greene County Coop to be in position to serve the electric requirements of the addition to Lehigh Pipe's plant facilities (R. 5). Petitioner's predecessor had offered to provide the electric requirements of Lehigh Pipe's additional facilities, but following REA approval of that loan, Lehigh Pipe refused the offer. It then entered into a 20 year contract with Greene County Coop to receive the electric requirements of its additional facilities from such Coop over the transmission line to be built with the REA-loaned funds (R. 5-6).

Since Lehigh Pipe *was* receiving central station service at the time of the loan, there was no authority under the Rural Electrification Act to make a loan to build a transmission line to supply the power requirements of the addition to Lehigh Pipe's facilities (R. 5-6).

The complaint also alleges the existence of an unlawful and continuing conspiracy among respondents and

representatives of Greene County Coop and CIPCO as a result of which the qualification of Lehigh Pipe as a proper beneficiary under the Rural Electrification Act was and remains approved (R. 7, 8). It is further alleged that petitioner is and will continue to be, at least until the end of the 20 year contract, damaged as a direct result of the illegal loan and conspiracy in that it is excluded from furnishing the additional power requirements of its customer Lehigh Pipe and may be deprived of serving other industrial and municipal customers presently receiving central station service from petitioner (R. 6-8).

PROCEDURAL HISTORY OF THE CASE

Petitioner has pressed this case with diligence. The complaint was filed August 31, 1956, several days after final approval of the construction of the transmission line by the Iowa State Commerce Commiss[illegible] before which the complaint might have been premature. A motion for preliminary injunction was filed with the complaint. On September 24, 1956, the District Court by informal memorandum denied the motion for preliminary injunction. On September 26, 1956, the District Court entered conclusions of law and an order denying the motion on the sole ground that petitioner had no standing to sue. On the same date the District Court denied an oral application by petitioner for a stay pending appeal. On September 27, 1956, petitioner filed a notice of appeal. Petitioner filed its brief in the Court of Appeals on October 19, 1956, thirty-three days before such brief was required under the Rules and on November 14, 1956, the petitioner filed a motion which was granted to advance the case on the calendar for early hearing. The Court of Appeals decided the case on February 28, 1957, and amended its opinion

and judgment on March 12, 1957. The petition for writ of certiorari was filed herein on May 28, 1957. This Court has not yet acted on that petition and is presumably holding it in connection with *Panama Canal Company* v. *Grace Line, Inc., et al.*, No. 251, which involves a similar question as to standing to sue under Section 10(a) of the Administrative Procedure Act and which is to be argued shortly.

While petitioner has thus been diligently proceeding to try to get a decision on its standing to challenge the validity of the questioned loan, respondents have nevertheless apparently proceeded to disburse that loan. They now claim that the case has been thereby mooted, relying solely on an affidavit of David A. Hamil, Administrator of the Rural Electrification Administration, which states that all obligations of the REA to advance funds under the loan agreement have been performed. Petitioner has no reason to doubt the accuracy of those statements, but submits that such statements do not justify the legal conclusion that the case is moot.

SUMMARY OF ARGUMENT

This case has not been mooted by respondents' action in advancing all funds under the challenged loan agreement. Defendants in injunction actions who complete the acts sought to be enjoined do so at their peril and do not thereby create mootness. Jurisdiction remains to award mandatory and incidental relief. *Texas & New Orleans Railroad* v. *Northside Belt Railway*, 276 U. S. 475; *Jones* v. *Securities and Exchange Commission*, 298 U. S. 1; *Ramsburg* v. *American Investment Co.*, 231 F.2d 333. At this preliminary stage of the case, before trial and determination of the facts and equities, it is impossible to say precisely what relief may be awarded to petitioner, but it cannot be said

that petitioner is entitled to none. Depending upon the extent to which petitioner is able to prove the allegations of the complaint and what proof is submitted by respondents, petitioner may be entitled to mandatory relief, declaratory judgment, or damages or other incidental relief.

This case also falls within the rule that cases will not be dismissed as moot, even where there is some technical basis for doing so, if (1) the act complained of may have a continuing effect or be renewed, or (2) the question presented is one of public importance, or (3) the interpretation of a statute or regulation is involved and the decision may provide a useful guide for future administrative action. *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498; *Gay Union Corp.* v. *Wallace*, 112 F. 2d 192; *Walling* v. *Haile Gold Mines, Inc.*, 136 F. 2d 102.

The cases cited in the memorandum of respondents are no authority for concluding that this case is moot. None have any factual similarity to this case and all are completely distinguishable. They are cited by respondents simply for the proposition, with which petitioner does not quarrel, that when this Court decides that a case is moot and should be dismissed for that reason, the proper procedure is to vacate the judgments below and to remand with a direction of dismissal.

ARGUMENT

I. The Case Is Not Moot

This case is not moot. The affidavit and the memorandum of respondents constitute nothing more than a bare assertion that the respondents by completing the challenged action can deprive an equity court of its jurisdiction by shouting "Moot". That course has been tried before. Significantly respondents have not

cited any cases where it has been successful. Understandably, the law does not permit such a shocking result—of letting defendants end cases by the simple expedient of their completing challenged action before there has been a final decision as to whether it should be restrained. It has long been held that defendants in injunction actions who complete the acts sought to be enjoined do so at their peril, and cannot insulate themselves by their own action. Courts in protecting their jurisdiction from such attempts at defendant-made mootness have caused buildings built to be torn down and buildings torn down to be rebuilt.

In *Texas & New Orleans Railroad* v. *Northside Belt Railway,* 276 U. S. 475, an injunction was sought against, *inter alia,* the construction of a railroad line. The District Court denied the injunction on the merits. The Circuit Court of Appeals affirmed the decree of the District Court without passing on the merits, holding that the cause had become moot because defendants had completed construction of the railroad and it was in operation. After first stating that there was no basis in the record for finding that construction of the railroad had been completed or that it was in operation, Mr. Justice Brandeis speaking for a unanimous Court stated at page 479:

> "Moreover, the facts erroneously found [completion of action sought to be enjoined] would not, if true, have rendered the case moot. For where a defendant, with notice of the filing of a bill for an injunction, proceeds to complete the acts sought to be enjoined, the court may, by mandatory injunction, compel a restoration of the status quo."

Again in *Jones* v. *Securities and Exchange Commission,* 298 U. S. 1, 15-16, this Court stated, unanimously

as to this point:

> "The rule is well settled, both by the courts of England and of this country, that where a suit is brought to enjoin certain acts or activities, for example, the erection of a building or other structure, of which suit the defendant has notice, the hands of the defendant are effectually tied pending a hearing and determination, even though no restraining order or preliminary injunction be issued."

and at pages 17-18:

> "The conclusion to be drawn from all the cases is that after a defendant has been notified of the pendency of a suit seeking an injunction against him, even though a temporary injunction be not granted, he acts at his peril and subject to the power of the court to restore the status, wholly irrespective of the merits as they may be ultimately decided."

Ramsburg v. *American Investment Co.*, 231 F. 2d 333 (7 Cir.) discusses at considerable length decisions by this Court and others as to alleged mootness where defendants have elected to complete actions sought to be enjoined. That opinion states at p. 336:

> "Applying these decisions we are able to formulate the question for determination where, as here, a cause for injunctive relief is met by a contention of mootness because the status of the parties and of their relationship to the subject matter is changed. The decisive issue is whether the subject matter may yet be reached by the mandatory power of equity and the status quo restored. If so, the cause is not moot. [citations.] And even where the subject matter has been so completely destroyed as to preclude restoration of the status quo, the court still has jurisdiction to grant incidental relief and the cause is not moot. [citations.]"

It has been noted in several of the leading decisions of this Court where cases were dismissed as moot that the result might well have been otherwise if the claim of mootness had rested on the actions of the defendant instead of on the plaintiff's own act or that of a power beyond the control of either party. See *Mills* v. *Green*, 159 U. S. 651, 654; *United States* v. *Hamburg-American S. S. Co.*, 239 U. S. 466, 477. Significantly, all of the cases cited by respondents presented situations where; (1) the relief sought had been achieved, (2) the controversy had been settled by the parties, or (3) extrinsic circumstances had rendered impossible the relief sought. Those cases are discussed in detail at pages 14-17 hereof.

The declaratory relief sought by petitioner in the complaint herein is still appropriate. The statutory language in that regard reads in relevant part: "In a case of actual controversy * * *, any court of the United States, * * *, may declare the rights and other legal relations of any interested party seeking such declaration whether or not further relief is or could be sought." 28 U. S. C. § 2201, 62 Stat. 964, as amended. Even without reference to the Declaratory Judgment Act, the courts have held that where a case at its inception was proper for injunctive relief and included a prayer for a declaration of the rights of the parties, the removal by defendant during the pendency of the suit of the grounds for injunctive relief, did not deprive the courts of jurisdiction to declare the rights of the parties. *Barrett* v. *Denver Tramway Corp.*, 146 F. 2d 701, 702 (3 Cir.), *Ramsburg* v. *American Investment Co., supra,* at 336, and *United States* v. *Bates Valve Bag Corp.*, 39 F. 2d 162, 164 (D. C. Del.). The holdings in those cases are in line with the statements of this Court in *Mills* v. *Green, supra,* and *United*

States v. *Hamburg-American S. S. Co., supra,* that a defendant by its own act cannot remove the actuality of a controversy so as to defeat the jurisdiction of the courts.

Since the instant case has not been presented to the trial court on the merits, the equities of the parties have not been determined and, indeed, could not be on the basis of the scant record. It is, therefore, impossible to say what relief petitioner may be entitled to, but it cannot be said that petitioner is entitled to none. Certainly the circumstance that petitioner may no longer be able to get the challenged loan restrained is no basis for concluding that petitioner cannot get any relief. Depending upon the extent to which petitioner is able to prove the allegations of its complaint and upon what the proofs of respondents are, it is conceivable that the trial court might award the following kinds of relief, consistent with the prayers of the complaint, if it should find, as petitioner is confident it will, that the challenged loan is illegal:

(1) A mandatory order might be issued directing the respondents to recoup the loan. In this connection, the loan agreement in question is not in the record. Petitioner does not know its contents or what provisions it contains, if any, respecting repayment in the event the loan is found to be illegal or it is proved that the borrowers engaged in misrepresentation.

(2) Declaratory judgment might be issued that the loan is illegal. The self-enforcing tendency of such a judgment is noted by one of the leading authorities on the technique (Borchard, *Declaratory Judgments* (2d Ed., 1941), Preface, p. xv). Faced with such a judgment, respondents might initiate action to undo their illegal work.

(3) Respondents are sued individually as well as in their official capacities. Damages might be awarded against them for the harm done to petitioner by their illegal action.

(4) Relief might be given against the continuing conspiracy alleged in the complaint.

It is immaterial that relief along the foregoing lines may not give petitioner the full relief it sought at the outset, and it is likewise immaterial that it may eventually be found that petitioner is not entitled to any relief. This case is not moot so long as it is conceivable that any relief can be given to petitioner. At this preliminary stage, before there has been a trial and any determination of the facts and equities, it cannot be said that petitioner is entitled to no relief. Moreover, such a decision is a matter which this Court should not undertake in the first instance. The trial court should perform that function. Accordingly, this Court should reject respondents' assertion that they have mooted the case by their actions, and should let the case follow the orderly judicial procedure of leaving the question of fact finding and relief to the sound discretion of the trial court exercising its equity powers. *Cf. SEC* v. *Okin*, 132 F. 2d 784, 787 (2 Cir.). Otherwise, petitioner will be denied its day in court and its opportunity to demonstrate that it is entitled to relief, simply because respondents have been able to disburse the challenged loan while the case has been pending on appeal on the question of standing to sue.

II. Even If the Case Could Be Regarded as Technically Moot It Should Not Be Dismissed

While the Federal courts have carefully avoided passing on abstract or hypothetical questions where decisions would constitute nothing but advisory opin-

ions, they have been equally zealous in retaining jurisdiction of cases urged as moot when they believed that the decision would affect existing and future rights. The reasons asserted for retaining jurisdiction of such cases have not always been uniform, but may be categorized generally as follows:

> (1) When the act against which specific relief is sought may have a continuing effect or may be renewed;
>
> (2) Where the question presented is one of public importance; and
>
> (3) Where the case involves interpretation of a statute or regulation and decision thereof may provide a useful guide for future administrative action.

The Courts have on occasion found more than one of the foregoing situations to be presented in cases and have stated them as alternate bases for refusing to dismiss cases as moot. *E.g.: Southern Pacific Terminal Co.* v. *ICC,* 219 U. S. 498; *Gay Union Corp.* v. *Wallace,* 112 F. 2d 192 (D. C. Cir.); *Walling* v. *Haile Gold Mines, Inc.,* 136 F. 2d 102 (4 Cir.).

In *Southern Pacific Terminal Co.* v. *ICC, supra* at 515, it was held, where an order of the Commission had expired by its terms, that an action to enjoin such order as illegal would not be dismissed as moot, stating:

> "The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar), and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review, and at

> one time the Government and at another time the carriers have their rights determined by the Commission without a chance of redress."

As an alternate ground of its decision the Court cited *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, for the proposition that a case presenting a question of public importance will not be dismissed as moot. The fact that the party seeking the determination of such a question was a private citizen rather than the Government was held not to lessen the necessity for the court's continuing its jurisdiction to decide a question of public import.

The instant case presents both the bases for which the Court refused to dismiss the *Pacific Terminal* case. Here instead of a two year order which expired pending final judicial action we have an REA loan capable (as has been demonstrated) of being fully disbursed to the borrower prior to judicial determination as to its legality. Obviously the completion of the loan to that extent does not remove its adverse effects on petitioner which may have to endure them at least for the 20 year period of the contract between its customer Lehigh Pipe and Greene County Coop. Also presented herein is a question of public importance—namely, can the REA make 2 per cent loans to build facilities to serve persons already receiving central station service from an established utility company, although the Act limits such loans to providing service to "persons who are *not* receiving central station service". On that point Representative Rayburn, who was Chairman of the House Committee having jurisdiction of the bill which became the Act, stated:

> "May I say to the gentleman that we are not in this bill, intending to go out and compete with anybody. By this bill we hope to bring electrifica-

> tion to people who do not now have it. This bill was not written on the theory that we were going to punish somebody or parallel their lines or enter into competition with them." *

It is of substantial public significance to have a determination of the above-stated question. Such a determination will also serve the useful purpose of being a guide to respondents in passing upon other loan applications. *Cf. Gay Union Corp.* v. *Wallace, supra; Walling* v. *Haile Gold Mines, Inc., supra; Walling* v. *Mutual Wholesale Food & Supply Co.*, 141 F. 2d 331 (8 Cir.); and *Boise City Irrigation Co.* v. *Clark*, 131 Fed. 415 (9 Cir.).

III. The Cases Relied on by Respondents Do Not Support the Conclusion That This Case Should Be Dismissed As Moot

Respondents have cited nine decisions of this Court in their memorandum (p. 3). Those decisions are not cited for the proposition that this case is moot, but simply for the proposition, with which petitioner does not quarrel, that when this Court decides that a case is moot and should be dismissed for that reason the proper procedure is to vacate the judgments below and to remand with a direction of dismissal.

Analysis of the decisions cited by respondents shows that they are no authority for concluding that this case is moot. None of them bears any factual similarity to the instant case and none of them involves a situation where the basis of the asserted mootness was that the defendant had completed the action sought to be enjoined. Rather, as stated at page 9 above, the cited decisions presented situations where (1) the relief sought had been achieved, (2) the con-

* 80 Cong. Rec. 5283.

troversy had been settled by the parties, or (3) extrinsic circumstances had interfered to render impossible the relief sought.

In three of the decisions cited the relief sought had been obtained.

Cozart v. *Wilson*, 352 U. S. 884, and *Garcia* v. *Landon*, 348 U. S. 866, where *habeas corpus* proceedings where the petitioners had been released from restraint before final action by this Court. *Eastern Airlines* v. *CAB*, 341 U. S. 901, also involved a situation where defendant prior to final action by this Court had remedied the situation complained of by the plaintiff. The CAB, without holding a hearing, had issued an exemption order permitting Capital Airlines to serve certain territory. Eastern Airlines contended that such an exemption order could not legally be granted by the Board without a hearing. That question was presented to this Court by petition for certiorari. Before determination of that question by this Court, the CAB *after a full hearing* had given Capital Airlines the same authority by a certificate of necessity rather than by exemption.

The subject matter of the controversy had been settled in *Brotherhood of Locomotive Firemen and Enginemen* v. *United States*, 343 U. S. 971. It was an action brought by the United States after it had taken over operation of the railroads, pursuant to Executive Order, to enjoin the Brotherhoods from striking after a strike call had been issued. From a temporary injunction entered by the District Court a petition for certiorari was filed in this Court. After the filing of the petition, the wage dispute, which was the apparent basis for the strike, was settled and the railroads restored to private ownership. Since the subject matter of the controversy had been settled, and the United

States after relinquishing control of the railroads was no longer a proper party to the action, it was directed to be dismissed as moot.

In the other cases * cited by respondents, extrinsic circumstances rendered impossible the relief sought. In *United States* v. *Munsingwear*, 340 U. S. 36, the United States had filed an injunction suit against defendant to compel compliance with a maximum price regulation. The District Court had determined that defendant was not in violation of such regulation. Pending an appeal from that decision, the regulation was annulled by the President. The Court of Appeals held that since there was no law which would sustain the injunction sought by the plaintiff, the case was moot. The only question passed on by this Court was whether to vacate the judgments below and direct dismissal of the case or to leave intact the judgment of the District Court. The former course was ordered. *Los Angeles Building & Construction Trades Council* v. *Le Baron*, 342 U. S. 802, involved a petition for certiorari from a District Court injunction which by its express terms dissolved upon final adjudication by the National Labor Relations Board of the matters involved in the action. Pending determination by this Court final adjudication was made by the NLRB and the injunction by its terms expired. Similarly in *SEC* v. *Harrison*, 340 U. S. 908, a preliminary injunction expired by its own terms pending decision of a petition for certiorari by this Court. And in *Howard* v. *United States*, 340 U. S. 898, a petition for certiorari was pending in this Court from a District Court order

* There is nothing in the opinion or the case file in *United States* v. *Amarillo-Borger Express, Inc.*, 352 U. S. 1028, which would indicate the basis of the mootness holding. A check at the Clerk's Office has revealed that the question of mootness appeared during oral argument.

committing a grand jury witness to custody until she indicated her desire to "return to the said Grand Jury" and truthfully testify. The grand jury referred to in the order of the District Court was discharged pending determination of the petition by this Court, thus making it impossible for the order of the District Court to be complied with.

It is accordingly apparent that none of the decisions cited by respondents constitutes any authority for the proposition that this case is moot.

CONCLUSION

Petitioner submits that it is repugnant to the very nature of justice to permit a defendant in an action seeking injunctive and other relief to be able to nullify the jurisdiction of a court of equity simply by completing the action sought to be enjoined. In the absence of trial and on the basis of the scant record in this case, this Court should not deprive the District Court of its jurisdiction to grant such mandatory or incidental relief as it may find to be required after the facts of the case have been fully developed. As recently as March 3, 1958, this Court emphasized:

> "Generally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied power."

Harmon v. *Brucker*, ____ U. S. ____ (Nos. 80 & 141). It would be ironic indeed if petitioner is unable to have judicial relief against the acts of respondents which are claimed to be illegal, merely because respondents say they have finished their affirmative part in them, and presumably it merely remains for their successors to receive repayment years hence of the fully disbursed loan.

Having disposed of respondents' suggestion that subsequent developments have mooted this case, we conclude by pointing out that subsequent developments have strengthened the case for granting certiorari here. In addition to the reasons previously advanced—the importance of the question presented as to standing to sue under Section 10(a) of the Administrative Procedure Act and the conflict on that question with the decision of the Second Circuit in *Panama Canal Co.* v. *Grace Line, Inc., et al.*, No. 251—there are now the following additional reasons for granting certiorari:

1. The decision of the court below in this case conflicts, at least in principle, with the holding in *Harmon* v. *Brucker, supra,* and the express statements therein as to the right to judicial review of persons who have been injured by acts of Government officials in excess of their powers.

2. Certiorari has been granted in the *Grace Line* case, the Government's brief therein has been filed and the case is to be argued shortly. We have carefully examined the arguments contained in that brief as to standing to sue under Section 10(a) of the Administrative Procedure Act, which must of necessity be substantially the same in this case. We do not believe that such arguments constitute a valid basis for the restrictive interpretation of Section 10(a) which is urged in that brief. We think that the establishment of the right to judicial review in situations such as are presented in this case and in the *Grace Line* case is a matter of transcendent importance. If certiorari is granted in this case, we are confident that we can demonstrate that petitioner has a right to judicial review under Section 10(a). Petitioner satisfies every requirement of the language of that Section. The expanded avail-

ability of judicial review provided by the Administrative Procedure Act, *cf. Heikkila* v. *Barber*, 345 U. S. 229, 232, is part of the evolution of the law to meet the needs of the times. As the Court of Appeals stated in the *Grace Line* case, 243 F. 2d at 856, "The growing tendency of the courts and Congress has been to submit more matters once thought to concern internal government administration to examination in open court", and compare also the holding of this Court in *Harmon* v. *Brucker, supra.* The Government's position that Section 10(a) of the Administrative Procedure Act merely codified the pre-existing law on the subject of judicial review must be rejected.

For the reasons stated, petitioner submits that this Court should deny the request of respondents that this case be dismissed as moot and should instead grant the petition for certiorari.

Respectfully submitted,

E. FONTAINE BROUN
JOHN H. PICKERING
HENRY T. RATHBUN
616 Transportation Building
Washington 6, D. C.

Attorneys for Petitioner

WILMER & BROUN
616 Transportation Building
Washington 6, D. C.

Of Counsel